Filed 4/20/10 P. v. Fields CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT L. FIELDS et al., Defendants and Appellants.	B207318 (Los Angeles County Super. Ct. No. TA088319)

APPEAL from judgments of the Superior Court of Los Angeles County. Paul Bacigalupo, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Robert L. Fields.

Meredith Watts, under appointment by the Court of Appeal, for Defendant and Appellant Shandale S. Reyes.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant Kenneth Franklin.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Robert L. Fields, Shandale S. Reyes, and Kenneth Franklin appeal from judgments entered after a joint trial resulted in their conviction of multiple counts of second degree robbery. Appellants join in the contentions of one another insofar as they are applicable. Appellants contend that insufficient evidence supported the jury's finding that the crimes were committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members."[1] They also contend that the trial court abused its discretion in denying a defense motion to bifurcate the gang allegations for separate trial, and that when the court imposed consecutive terms of imprisonment, it erroneously believed that it had no discretion to run the sentences concurrently. Fields contends that the evidence was insufficient to support his conviction of counts 8 and 17. We reject appellants' contentions and affirm the judgments.

PROCEDURAL BACKGROUND

In an amended and consolidated information filed December 21, 2007, appellants were charged with five other codefendants with multiple counts of second degree robbery stemming from the robberies of two Verizon Wireless Stores. Only Fields, Reyes, and Franklin are parties to this appeal.

Fields was charged with 14 counts of robbery in counts 1 through 10, 12, 15, 16, and 17. Reyes was charged with 11 counts of robbery in counts 1 through 10 and 12, and Franklin was charged with 11 counts of robbery in counts 2 through 12. Each count alleged a separate victim, as follows:

Count 1 -- the Carson robbery (alleged against Fields and Reyes): Julio R., victim.

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[1] Penal Code section 186.22, subdivision (b)(1).

Counts 2 through 10 and 12 -- The Carson robbery (alleged against all three appellants):

2. Andre S.;
3. Markis C.;
4. Dondrick L.;
5. Arturo B.;
6. Mohammad T.;
7. William R.;
8. Marvelette C.;
9. Oscar G.;
10. Samuel N.;
12. Domenica S.

Count 11 -- the Carson robbery (alleged against Franklin only): Catalina A.

Counts 15 through 17 -- the Palmdale robbery (alleged against Fields only):

15. Hugo D.;
16. Carlos B.;
17. Kristina G.

As to counts 1 through 17, the amended information alleged that each appellant personally used a handgun, within the meaning of Penal Code section 12022.53, subdivision (b),[2] and that a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e)(1). The information further alleged that the crimes charged in counts 1 through 17 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members.[3]

Appellants were tried together, and after a jury trial, the three were acquitted of count 4, and Franklin was acquitted of count 11, but they were convicted of the remaining counts alleged against them. Thus, Fields was convicted of counts 1, 2, 3, 5

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[2] All further statutory references are to the Penal Code, unless otherwise stated.

[3] The information and the verdict form stated "for the benefit of, at the direction of, *and* in association with any criminal street gang, with the specific intent to promote, further, *and* assist in any criminal conduct by gang members." (Italics added.) However, section 186.22, subdivision (b)(1)(C), is worded in the disjunctive: "[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, *or* in association with any criminal street gang, with the specific intent to promote, further, *or* assist in any criminal conduct by gang members, shall, . . . be punished [¶] . . . [¶] . . . by an additional term . . . ." (Italics added.) The jury was correctly instructed with CALCRIM No. 1401, which uses the disjunctive language of the statute.

through 10, 12, 15, 16, and 17; Reyes was convicted of counts 1, 2, 3, 5 through 10, and 12; and Franklin was convicted of counts 2, 3, 5 through 10, and 12.

The trial court sentenced Fields to a total of 80 years 4 months in prison. The court chose the upper term of five years as to count 1 as the principal term, and imposed one-third the middle term -- one year -- as to each of the remaining 12 counts, to run consecutively with the principal term. The court imposed a consecutive 10-year enhancement on the principal term due to the personal use of a firearm, pursuant to section 12022.53, subdivision (b), as well as one-third that enhancement -- three years four months -- on each of the remaining 12 counts. An additional 10-year enhancement was imposed on the principal term due to the gang finding, pursuant to section 186.22, subdivision (b)(1)(C). The court imposed but stayed concurrent gang enhancements, except as to count 15, on which the court imposed a consecutive term of three years four months, one-third the 10-year gang enhancement.

The court sentenced Reyes to a total of 64 years in prison. The court chose the upper term of five years as to count 1 as the principal term, and imposed one-third the middle term -- one year -- as to each of the remaining nine counts, to run consecutively with the principal term. The court imposed a consecutive 10-year enhancement on the principal term due to the personal use of a firearm, pursuant to section 12022.53, subdivision (b), as well as one-third that enhancement -- three years four months -- on each of the remaining nine counts. An additional 10-year enhancement was imposed on the principal term due to the gang finding, pursuant to section 186.22, subdivision (b)(1)(C). The court imposed but stayed concurrent gang enhancements as to the remaining counts.

The court sentenced Franklin to 59 years 4 months in prison. The court chose the upper term of five years as to count 2 as the principal term, and imposed one-third the middle term – one year -- as to each of the remaining eight counts, to run consecutively with the principal term. The court imposed a consecutive 10-year enhancement on the principal term due to the personal use of a firearm, pursuant to section 12022.53,

subdivision (b), as well as one-third that enhancement -- three years four months -- on each of the remaining eight counts. An additional 10-year enhancement was imposed on the principal term due to the gang finding, pursuant to section 186.22, subdivision (b)(1)(C). The court imposed but stayed concurrent gang enhancements as to each of the remaining counts.

Each appellant filed a timely notice of appeal.

FACTS

1. *The Carson Robbery -- December 24, 2006*

The Verizon Wireless store on South Avalon Boulevard in Carson was robbed between 9:00 and 9:20 a.m. on December 24, 2006. There were 12 employees in the store that morning and a few customers. The employees there at the time included Julio R., Andre S., Markis C., Arturo B., Mohammad T., William R., Marvelette C., Oscar G., Samuel N., and Domenica S.[4]

The entire incident lasted approximately three minutes and was captured on the store's 12 security cameras. Four African-American men entered the store in two groups of two and, with guns drawn, ordered everyone to lie down on the floor. Fields, Reyes, and Franklin were identified at trial as three of the robbers. All three displayed guns during the robbery. The robbers took approximately $12,000 from the safe after employee William R. opened it, $100 from Julio R.'s cash register, and some personal cell phones.

When one of the employees, Oscar G., saw the robbers leave, he went outside in time to see a red Nissan automobile leaving the parking lot with five occupants, including

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[4] Dondrick L., the victim alleged in count 4, did not testify. The only evidence regarding him was Markis's testimony that he arrived while the robbery was in progress, and *started* to enter the store. Appellants were acquitted of count 4. A customer, Catalina A., alleged to be the victim in count 11, was also in the store, accompanied by her two children. Catalina did not testify that the robbers stole anything from her, and that count resulted in an acquittal.

one he recognized as one of the four robbers. Oscar ran to the street and stopped a sheriff's car, pointed at the getaway car, and told the driver, Deputy Gaines, that the store had been robbed at gunpoint. The deputy made a U-turn and sped off after the car as it headed toward the freeway. Deputy Gaines called for backup and followed the red car onto the freeway (without lights or siren). At the Normandie exit, the driver lost control, and the red car spun around and stopped, facing Deputy Gaines's patrol car. Four African-American men got out of the car and ran away. The driver, a woman, remained seated behind the wheel.

Four men were captured in the area less than two hours later. Soon afterward, Deputy Gaines identified Reyes and Fields as the two of the men he saw running from the red car. Later, when Gaines was shown a photographic lineup, he identified all four men who had fled the red Nissan, including Fields, Reyes, and Franklin.

Approximately two hours after the robbery, store employees Julio, Markis, Oscar, and Samuel were taken to the location where two of the men had been detained. Julio recognized Fields as one of the robbers. Markis identified Fields. Oscar identified Reyes and Fields. Samuel identified Franklin.

The Verizon employees identified appellants in court as the robbers. Julio identified Fields and Franklin. Markis identified Fields. Oscar identified Reyes and Fields. Mohammad, Marvelette, and Samuel identified Franklin. William identified Franklin, but was not certain.

The driver of the getaway car, Patricia B., testified for the prosecution. The morning of the robbery, she drove two people to the Carson Verizon Wireless Store. They were former codefendant Troy Jelks, and either Franklin or Reyes, but she did not remember which. When she drove away a few minutes later, Fields, Franklin, Jelks, and Reyes were in her car. She identified appellants in court as three of her passengers. Patricia testified that appellants and Jelks ran out of the store and told her to drive. Moments later, she saw a man flagging down a deputy sheriff, saying, "The red car just robbed us." She saw the patrol car make a U-turn and follow behind her. The siren was

activated after she entered the freeway, but she did not stop, because Jelks said, "Don't slow down and don't stop." After approximately five minutes on the freeway, cars stopped ahead, causing her to have to brake suddenly and lose control. When the car stopped, all her passengers hopped out and ran. She was arrested.[5]

Patricia told investigators that appellants and Jelks had robbed the Verizon store December 24, 2006, while she waited outside. In court, she viewed the security video, and identified Fields, Reyes, and Franklin as they were shown robbing the store.

Patricia had known Jelks, Reyes, and Franklin for many years. She testified that they were members of the Menlo Gangster Crips gang (Menlo Gangsters). Fields was not a member of that gang, but belonged to the Neighborhood Crips gang. Patricia explained that members of both gangs would "hang out" with one another.

Sheriff's department fingerprint specialists obtained fingerprints from the red Nissan and found matches to prints on file for Franklin and Reyes.

2. *The Palmdale Robbery -- December 13, 2006*

On December 13, 2006, Troy Jelks and another man robbed the Palmdale Verizon Wireless store in the presence of three employees, Hugo D., Carlos B., and Kristina G. Both men used guns. Jelks ordered Kristina and Carlos into the restroom at gunpoint, while Hugo was ordered to open the safe. The robbers took more than $6,000 from the safe.

Kristina identified Fields in a photographic lineup and later in court as the second robber. She was 90 percent sure that he was the second man.

Hugo did not identify any of the appellants in court. Recalled to the witness stand after the prosecution was informed that Hugo had spoken in the hallway to the investigating officer, Hugo denied having recognized one of the defendants, but admitted

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[5] Patricia entered into a plea bargain, pled guilty to robbery, and was sentenced to 16 years in prison in exchange for her testimony.

that he did not want to testify because he was frightened for himself and his family. He claimed he did not remember telling Sergeant Reynolds in the hallway that he recognized one of the men in court. Later, the investigating officer, Sergeant Reynolds, testified that Hugo told him that while he was testifying, he recognized one of the defendants, but Hugo refused to tell him who it was, because he was afraid for himself and his family.

3. *Expert Gang Evidence*

Los Angeles County Sheriff's Sergeant Frederick Reynolds testified as the prosecution's gang expert. He testified that the primary activities of the Menlo Gangsters were murder, robbery, narcotics sales, burglary, auto theft, and carrying concealed weapons and loaded firearms. Reynolds brought certified court records showing the convictions of Menlo Gangsters Winston Bolden and Randy Lamont. He testified that the Menlo Gangsters had 142 members and were allied with the Neighborhood Crips. Reynolds explained that gangs formed alliances to create a bigger pool of men to assist in committing crimes and to provide protection from rival gangs.

Reynolds testified that he and other gang investigators kept track of gang members and their associates in part with field identification cards prepared in the field whenever investigators talked to gang members. Investigators note such information as the gang member's name, address, gang affiliation, moniker or alias, and physical characteristics such as height, weight, scars, marks, and tattoos. The sheriff's department and area police departments shared the gathered information.

Sergeant Reynolds believed that Franklin, Reyes, and Jelks were members of the Menlo Gangsters, and that Fields was a member of the 67th -- or 115th -- Neighborhood Crips. His belief was based upon the field information card showing that Reyes had admitted being a member of the Menlo Gangsters, as well as information Reynolds had gained from Patricia B. and a member of the gang, Kevin Simmons. In addition, the territory of the Menlo Gangsters was bounded by Hoover Street and Vermont Avenue, and Florence Avenue and 64th Street. Franklin's father, who was connected to the gang

but not a member, owned a store in that area, which was painted in the gang's colors, blue and gold. Franklin and Jelks were arrested there in January 2007.

Sergeant Reynolds was of the opinion that the Carson and Palmdale robberies were committed in association with the Menlo Gangsters, because multiple members of the gang participated in the crimes. It was also his opinion that the robberies were committed for the benefit of the gang, based on the fact that a number of members were involved in the robberies, as well as his understanding of what gang members usually do with the proceeds from such crimes. Usually, Reynolds explained, they divide them with other gang members who helped plan the robbery, and either keep their shares or use them to fund other crimes or to buy weapons which they use to protect gang territory.

DISCUSSION

1. *Denial of Motion to Bifurcate Gang Enhancement Allegations*

Appellants contend that the trial court abused its discretion in denying a defense motion to bifurcate the gang allegations and issues of guilt.

In a jury trial, when some of the evidence necessary to prove gang allegations is inadmissible to prove the underlying crime, the trial court may, in its discretion, bifurcate the proof of the gang allegations from the determination of the defendant's guilt of the underlying offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) However, bifurcation of issues is not favored and should not be granted unless the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id*. at p. 1049.)

Appellants bore the "burden 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Hernandez, supra,* 33 Cal.4th at p. 1051.) Appellants also bear the burden on appeal to establish an abuse of discretion. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 225 (*Albarran*).) The trial court's discretion will not be disturbed on appeal absent a showing by appellants

that the court exercised its discretion "'"in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citation.]'" (*Ibid.*)

In support of the motion to bifurcate, Reyes argued below that the evidence would be more prejudicial than probative when weighed pursuant to Evidence Code section 352, because gang evidence was inflammatory and did not prove an element of the offense. Fields and Franklin joined in that argument. Evidence to support a gang enhancement need not prove an element of the underlying crime; indeed, a motion to bifurcate may be denied "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . ." (*Hernandez*, *supra*, 33 Cal.4th at p. 1050.) Further, a refusal to bifurcate is not an abuse of discretion simply because "some of it might be excluded under Evidence Code section 352 as unduly prejudicial . . . ." (*Ibid.*)

Reyes contends that the prosecutor failed to "make a creditable argument why the probative value outweigh[ed] the prejudice," such as by showing that the gang evidence would be relevant to motive or modus operandi. We disagree. The prosecutor claimed that gang evidence would be relevant to the issue of identity. He argued to the court: "I don't anticipate every one of those employees or customers at the store to come in and be able to say, yes, all three of these guys were there. . . . [S]ome may be able to identify all three. Others may only be able to identify one. Some may be able to identify none." The prosecutor explained that gang membership was circumstantial evidence of identity, because "people will commit a crime such as an armed robbery with people they know and . . . trust, people from within the gang." He acknowledged that Fields belonged to a different gang from Reyes and Franklin, but stated that the evidence would show that Fields associated with the other gang.

When gang evidence is admitted to prove identity, any inference of prejudice is dispelled, making bifurcation unnecessary. (*Hernandez*, *supra*, 33 Cal.4th at pp. 1049-1050.) None of the appellants claimed that the gang evidence would be inadmissible to

establish their identities, or even that identity evidence was unnecessary. Franklin argued that he was not a gang member, but no evidence supported the motion, appellants did not refer to the preliminary hearing transcript, and the prosecutor represented that the evidence would show that all three defendants were connected to the Menlo Gangsters. Franklin merely argued, but failed to show, that the evidence would be insufficient to establish his connection to the Menlo Gangsters. Thus, appellants failed to meet their burden to establish a substantial danger of prejudice requiring the court to grant their motion to bifurcate. We conclude that the trial court did not abuse its discretion in denying the motion.

Reyes acknowledges that we review the trial court's discretion on the basis of the record as it was at the time of its ruling. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160-161 (*Mendoza*).) However, he contends that the judgment must nevertheless be reversed, despite appellants' failure to meet their burden in the trial court. Reyes relies on *People v. Grant* (2003) 113 Cal.App.4th 579, which held that even where the trial court's ruling on a motion to bifurcate was correct at the time it was made, the judgment must be reversed if the "'"defendant shows that joinder actually resulted in 'gross unfairness' amounting to a denial of due process." [Citation.]'" (*Grant*, at p. 587, quoting *Mendoza*, at p. 162.)[6]

Reyes contends that the trial was unfair because the gang evidence was unnecessary to establish identity, and thus, its only relevance other than proving the gang enhancement was as inadmissible character evidence. He points out that the prosecution presented several other kinds of identity evidence: photographic lineups in which witnesses identified appellants; surveillance videos in which several witness identified appellants; and a field show-up during which several witnesses identified appellants. Further, Reyes points to the manner in which he was apprehended after hiding in the

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6 Reyes contends that *Mendoza* requires a de novo review. The court makes no mention of a de novo or independent review in that case. (See *Mendoza*, *supra*, 24 Cal.4th 130.) We review the entire record for actual prejudice. (See *Albarran*, *supra*, 149 Cal.App.4th at p. 229.)

underside of a truck and to evidence that his fingerprint had been recovered from the red Nissan.

Reyes concludes from the strong evidence of identity presented at trial that the prosecutor's earlier arguments in opposition to the motion to bifurcate were disingenuous. We disagree. Although the identity evidence against Reyes was strong, he was not charged in the Palmdale robbery. Of these appellants, only Fields was tried for the robbery of both stores, and just one witness identified Fields as having robbed the Palmdale store with Troy Jelks. Sergeant Reynolds and Patricia testified that Franklin, Reyes, and Jelks were members of the Menlo Gangsters, and that Fields belonged to a different gang, the Neighborhood Crips, but associated with Menlo Gangsters. Thus, Reynolds's testimony regarding the alliance between the two gangs was necessary to strengthen the identification of Fields as Jelks's associate in the robbery of the Palmdale store. The prosecution was neither disingenuous nor mistaken.

Moreover, Reyes does not show how any lack of sincerity with regard to the Carson store "'actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*Mendoza, supra,* 24 Cal.4th at p. 162.) There can be no denial of due process unless there was *actual* prejudice, in that joinder "'"had substantial and injurious effect or influence in determining the jury's verdict."'" (*Albarran, supra,* 149 Cal.App.4th at p. 231, fn. 17, quoting *United States v. Lane* (1986) 474 U.S. 438, 449.) Overwhelming evidence of guilt precludes actual prejudice. (*United States v. Lane,* at p. 450.)

Franklin contends that the evidence of identity was not overwhelming, because Samuel identified Franklin in the field show-up, even though Franklin did not participate in it, and because witnesses disagreed about which robber wore the baseball cap and which wore the ski cap. Franklin also points to Marvelette's testimony that she suffered an emotional breakdown after the robbery, and he concludes that her ability to identify him was impaired. He also argues that his fingerprint could have been left on the red Nissan at anytime during his long acquaintance with Patricia. Franklin concludes that it

is probable that the jury convicted him solely because he was a member of a violent criminal gang.

We reject Franklin's contention that such minor inconsistencies detract from a very strong case. If anything, they demonstrate the relevance of the gang testimony to bolster witness identifications. Sergeant Reynolds testified that Franklin was a member of the same criminal gang as Reyes and Jelks, and that he and Jelks were known to associate with each other at the store owned by Franklin's father. Reynolds also testified that criminal gang members often commit robberies together to benefit the gang. He also testified that Franklin's gang was allied with Fields's gang. Thus, Franklin's association with the other robbers, together with the testimony of Julio, Mohammad, and William, dispelled any weakness in the testimony of Samuel and Marvelette.

In our review of the entire record, we found overwhelming nongang evidence showing that the Carson store was robbed and that appellants were three of the four men who robbed the store. The robbery was caught on video, and several employees identified appellants in the field shortly after the robbery, as well as in photographic lineups and in court. Julio identified Fields in the field shortly after the robbery, and he identified Fields and Franklin in court. Oscar identified Reyes and Fields in the field and in court as two of the robbers. William identified Franklin in court, although he was not certain. Marvelette and Mohammad both identified Franklin in court. Patricia, the getaway car driver, identified Fields, Franklin, and Reyes, along with Jelks, as the men who got into her car just before Deputy Gaines made a U-turn to follow them. Oscar saw the robbers get into the red Nissan automobile and pointed them out to Deputy Gaines as they drove away. Gaines kept the car in sight until it stopped and four men emerged and ran away. Gaines identified Reyes and Fields in the field not long after they were captured, and later, he identified all three appellants in a photographic lineup. Franklin's and Reyes's fingerprints were found on the red Nissan.

Because the evidence against appellants was overwhelming, we conclude that the joinder of the issues of guilt and the gang enhancement caused no actual prejudice. Thus,

reversal is not required. (See *United States v. Lane*, *supra*, 474 U.S. at pp. 449-450; *Albarran*, *supra*, 149 Cal.App.4th at p. 229.)

2. *Substantial Evidence -- Counts 8 and 17*

Fields contends that the evidence was insufficient to support the possession element of robbery as to counts 8 and 17.

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Fields contends there was no substantial evidence that Marvelette and Kristina, the employees alleged to be victims in counts 8 and 17, had actual or constructive possession of the property stolen by appellants. Fields relies, for the most part, on *People v. Frazer* (2003) 106 Cal.App.4th 1105 (*Frazer*), which enunciated a "standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property . . . ." (*Id.* at p. 1115.) The *Frazer* standard required a fact-based inquiry to determine "whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property." (*Ibid.*) Applying the reasoning of *Frazer*, Fields contends that Marvelette and Kristina, both customer service representatives, were not shown to have had sufficient representative capacity to have express or implied authority over the stolen cash.

The California Supreme Court recently disapproved *Frazer*'s "restrictive interpretation of the [robbery] element of possession." (See *People v. Scott* (2009) 45 Cal.4th 743, 757 (*Scott*).)[7] The court held that "all on-duty employees have

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[7] *Scott* was published after Fields filed his opening brief, but before he filed his reply brief. Although the Attorney General pointed out in his respondent's brief that *Frazer* had been disapproved in the meantime, Fields continued to rely on *Frazer* in his reply brief, arguing that *Scott* does not correctly reflect the state of the law in California. The California Supreme Court's disapproval of *Frazer* was express, and we are bound by it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

constructive possession of the employer's property during a robbery," explaining that "those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority. . . ." (*Id*. at p. 755.)

As previously stated by the California Supreme Court: "'"Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." [Citation.]'" (*People v. Nguyen* (2000) 24 Cal.4th 756, 761.) The court pointed out at that time that robbery convictions had been upheld upon a finding of constructive possession of an employer's property by security guards, janitors, a store truck driver, and others who do not have the responsibility of handling the property which was stolen. (*Ibid*.)

Here, the evidence showed that Marvelette was a Verizon employee on duty at the Carson store, working behind the customer service desk, when the robbers entered. One jumped over the counter with a gun in his hand, and said to her and the others to put their hands up and to lie on the floor, faces down. While she lay on the floor, her coworker, William, was ordered at gunpoint to open the safe, from which the robbers stole $12,000. Marvelette testified that she felt very traumatized.

The evidence showed that Kristina was a Verizon employee on duty at the Palmdale store, when the robbers entered. One of them ordered her at gunpoint to stop looking at him, and to go into the restroom and place her face against the wall. She complied because he had a gun. The robbers then took her coworker, Hugo, to open the safe, from which they stole more than $6,000.

As Marvelette and Kristina were on duty and obvious "potential sources of resistance," appellants' guilt does not turn on any actual or implied authority over the property stolen. (*Scott, supra*, 45 Cal.4th at p. 755.) "[B]usiness employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in

possession of property stolen from the business owner." (*People v. Jones* (2000) 82 Cal.App.4th 485, 491, cited with approval in *Scott*, at pp. 746, 751-752.) We conclude that the evidence was sufficient to establish that the two employees had constructive possession of their employer's property at the time it was stolen at gunpoint.

3. *Substantial Evidence -- Gang Enhancement*

Fields and Reyes contend that insufficient evidence supported the jury's true finding that the robberies were committed "for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members."

Relying on the interpretation of the California statute by two opinions of the Ninth Circuit Court of Appeals, Reyes and Fields contend that to prove the specific intent element of section 186.22, subdivision (b)(1), the People were required to show more than the commission of the current crime with another gang member; they were required to prove a specific intent to promote, further, or assist in *other* criminal conduct by the defendant's gang. (See *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1080; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-1104.) The reasoning of the federal court has been rejected in every opinion published by a California appellate court confronted with the same contention. (See *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-355 (*Vazquez*); *People v. Hill* (2006) 142 Cal.App.4th 770, 773-774 (*Hill*); *People v. Romero* (2006) 140 Cal.App.4th 15, 19 (*Romero*).) We reject it, as well.

"By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)" (*Romero*, *supra*, 140 Cal.App.4th at p. 19; see also *Vazquez*, *supra*, 178 Cal.App.4th at p. 353; *Hill*, *supra*, 142 Cal.App.4th at p. 774.) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v.*

Villalobos (2006) 145 Cal.App.4th 310, 322, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*).)

Reyes contends that the evidence was insufficient to support a finding that the robberies *promoted* the gang or its activities, because there was no evidence that the robbers "threw" their gang signs or wore gang "regalia," and the robberies were not shown to have been part of a territorial dispute with another gang. "The crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. [Where] there was no evidence of this[, t]he jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Morales*, *supra*, 112 Cal.App.4th at p. 1198; see also *Vazquez*, *supra*, 178 Cal.App.4th at pp. 353-354.)

Here, there was no lack of substantial evidence to support a finding that the robberies were committed in association with a criminal street gang, with the specific intent to assist in that criminal conduct by other gang members, as required by section 186.22, subdivision (b)(1). In reviewing a challenge to the sufficiency of the evidence to support a gang enhancement, we "'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.]" (*Romero, supra,* 140 Cal.App.4th at p. 18.)

Patricia had known Jelks, Reyes, and Franklin for many years, and testified that all three were members of the Menlo Gangsters. She testified that although Fields was not a member of that gang, and belonged to the Neighborhood Crips, members of both gangs would "hang out" with one another. Gang expert Sergeant Reynolds also testified that

Franklin, Reyes, and Jelks were known members of the Menlo Gangsters, and that their gang was allied with Fields's gang, the Neighborhood Crips.

A "'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [including robbery], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f), see also *id.*, subd. (e)(2).) Reynolds testified that the primary activities of the Menlo Gangsters were murder, robbery, narcotics sales, burglary, auto theft, and carrying concealed, loaded firearms, and that the gang has approximately 142 members. Patricia and Reynolds identified the gang signs used by Menlo Gangsters gang in a photograph, and testified that members liked to wear blue and gold clothing and caps with an "M" on them.

A "'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the [enumerated] offenses . . . by two or more persons." (§ 186.22, subd. (e).) Sergeant Reynolds submitted the conviction records of two members of the Menlo Gangsters, showing the commission of predicate offenses.

We conclude from our summary that substantial evidence supported findings that appellants were members of a criminal street gang, and that they assisted one another in the commission of the robberies. Thus, the jury could reasonably infer that appellants harbored the specific intent to assist in that criminal conduct by other gang members, as required by section 186.22, subdivision (b)(1). (See *Morales, supra*, 112 Cal.App.4th at p. 1198; see also *Vazquez, supra*, 178 Cal.App.4th at pp. 353-354.)

4. *Consecutive Terms of Imprisonment*

Appellants contend that when the court imposed consecutive terms of imprisonment for each robbery count, it erroneously believed that had no discretion to

run the sentences concurrently. They ask that the sentences be remanded for resentencing.

A sentencing court has broad discretion to impose consecutive sentences for multiple convictions. (§ 669; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) California Rules of Court, rule 4.425 sets forth criteria that are among the factors, along with the aggravating and mitigating factors set forth in rules 4.421 and 4.23, that may be considered by the court in deciding whether to impose consecutive rather than concurrent sentences. The factors set forth in the rules are not exclusive, and the judge may choose any criteria reasonably related to the sentencing choice, such as the existence of multiple victims. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1325-1326; Cal. Rules of Court, rule 4.408.)

As respondent points out, a review of the entire sentencing proceedings shows that the court understood its discretion, and that it exercised that discretion in sentencing appellants to consecutive terms. The attorneys were given the opportunity to present evidence, but submitted sentencing on their sentencing memoranda.[8] The court reviewed the sentencing memoranda and probation reports. In its initial remarks, the court stated that in defense counsel's arguments, there was a "general theme . . . whether to impose concurrent or consecutive sentencing on the multiple 211 counts and whether to, likewise, impose concurrent or consecutive sentencing on the enhancements." The court then stated that it was troubled that these young men were facing substantial prison time, but was "confined by the requirements of the law," and would "be imposing consecutive sentencing on the basis that there were multiple victims and multiple threats of violence . . . ."

Reyes argues that the trial court's mistaken belief that it did not have discretion to impose concurrent sentences is shown the comment quoted in the previous paragraph, by the court's reference at sentencing to *People v. Palacios* (2007) 41 Cal.4th 720, and by

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8 Although the record contains only the memoranda of Franklin and Fields, the court stated that it had received sentencing memoranda from all three defendants.

the court's comment that it would be imposing consecutive gun enhancements to the extent it believed that it was "bound by the law to impose consecutive sentencing in that regard." We disagree. It is clear from the court's remarks that it was referring only to the gun-use enhancements under section 12022.53, which mandates an additional and consecutive term of imprisonment to be added to each conviction of a qualifying felony (including robbery) committed with the personal use of a firearm. In *Palacios*, the California Supreme Court held that that the sentence enhancement provisions of section 12022.53 are not subject to the multiple punishment prohibition of section 654. (*Palacios*, at p. 723.) The court addressed only the consecutive sentencing of gun-use enhancements, not the consecutive sentencing of the underlying offenses.

At most, the court's initial remarks were ambiguous, because the court did not clearly separate its statement of reasons for choosing consecutive sentences on the robbery counts from the reference to the requirement of consecutive gun enhancements under section 12022.53. Later in the hearing, when the court pronounced tentative sentences, it clarified any ambiguity by separately stating the reasons for the two sentencing choices. The court ordered the gun enhancements to run consecutively, because the elements of section 12022.53 had been pled and proved. The court stated that it chose consecutive terms for the robbery convictions because the crimes involved multiple victims and separate threats of violence.

The record makes clear that the attorneys were not confused by any ambiguity in the court's initial remarks. When the court allowed counsel to argue after stating the tentative sentences, Reyes's counsel argued at length that the terms should run concurrently. The court replied:

> "Mr. Williams, you have identified potential mitigating factors that I have weighed heavily in the past few weeks, if not months, during the course of this case, and those factors I considered heavily prior to the commencement of this trial at the time when I urged these defendants to take the offers that were submitted to them at that time. That is history, of course, and I'm bound to follow the law and weigh aggravation versus mitigation; and having heard the case and all of the evidence and having heard the testimony of the voluminous number of witnesses and victims in

> this case, many of whom individually were subject to specific threats of violence, feared for their lives, I have had to conclude that the aggravation outweighs the mitigation."

The court's reply shows that it imposed consecutive sentences on the robbery convictions, not because it believed that the law prohibited concurrent sentences, but as an exercise of discretion upon weighing factors in aggravation and mitigation. We conclude that the court did not err.

DISPOSITION

The judgments are affirmed.

LICHTMAN, J.*

We concur:

RUBIN, ACTING P. J.

FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.